Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Prenotice Discussion of Amendments to Regulation 18225(b)(2)

Date: April 23, 2003

Introduction

"Express advocacy" is a term crucial to government regulation of campaign advertising. Its central importance grew out of the Supreme Court's initial review of the Federal Election Campaign Act, where the Court found that the First Amendment will sanction regulation of campaign speech when that speech contains what has come to be called "express advocacy." [1] Thus in California any person spending more than a threshold amount on speech that includes "express advocacy" becomes a "committee" under the Act, subject to associated public filing and disclosure obligations, and contribution limits.

Three months after *Buckley*, the Commission codified the high court's teaching on "express advocacy" by adopting regulation 18225(c)(2), which has survived without change as subdivision (b)(2) of the current regulation, which contains the Commission's definition of "expenditure." In 1979, the Legislature incorporated language from this regulation when it defined the term "independent expenditure" in § 82031.

In 1987 the Ninth Circuit Court of Appeal published an important discussion of express advocacy in *Federal Election Commission v. Furgatch.*[2] Over the next 15 years, while California courts remained silent on the issue, the Commission looked to *Furgatch* for guidance in applying its regulation and fixing the constitutional boundaries of express advocacy in close cases.

At the March meeting, staff presented a memorandum describing in detail how California appellate courts have recently entered the discussion of express advocacy, in *Schroeder v. Irvine City Council et al*, 97 Cal.App. 4th 174 (review den. June 26, 2002), and in *The Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449 (review den. December 22, 2002).[3] The *Davis* opinion, in particular, advised that the constitution requires that § 82031 and

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[1] The decision referenced here is *Buckley v. Valeo*, 424 U.S. 1 (1976).

[2] 807 F. 2d 857 (9th Cir. 1987). The *Furgatch* court articulated a three part test to be used in identifying express advocacy. First, speech is "express" if its message is unmistakable and unambiguous; second, speech may only be termed "advocacy" if it presents a clear plea for action; third, it must be clear what action is advocated. (*Id*. at 864.)

[3] The Commission, the California Attorney General, and the San Francisco Ethics Commission filed "Amicus Letters" with the California Supreme Court supporting plaintiff's unsuccessful Petition for Review. The Los Angeles City

regulation 18225(b)(2) be construed narrowly. Because the *Furgatch* opinion was thought to sanction an impermissibly broad understanding of express advocacy, *Davis* openly rejected the federal court's analysis.

In light of the apparent dispute between federal and state courts over the constitutional limits of express advocacy, the Commission directed staff to return for prenotice discussion of possible amendments to regulation 18225(b)(2), to clarify the meaning of express advocacy as the term is used in the Act. The Commission may amend the regulation to reflect the narrowest understanding of express advocacy, a "magic words" test supported by *Davis*, which considers only the words of a communication, interpreting their meaning without reference to any external cues. The Commission may also decide to codify the analysis actually employed by the *Davis* court, a modified "magic words" test that considers proximity to an election when evaluating the content of the communication. The former course is "safer," insofar as the narrower reading is less subject to constitutional challenge; but a modified "magic words" test may be more consistent with the purposes of the Act, the first of which is to promote full and truthful disclosure of campaign receipts and expenditures. (§ 81002(a).)

Finally, recognizing that the case law on express advocacy has been in flux throughout the quarter-century lifetime of regulation 18225(b)(2), the Commission may reasonably decide to read and apply the existing regulation conservatively, but to defer amendment of the regulation until next year. The United States Supreme Court is expected then to issue its decision on a multi-pronged challenge to the Bipartisan Campaign Reform Act passed by Congress in 2002.[4] That decision may well put to rest the uncertainty currently surrounding express advocacy, and may generate amendments to the Act that altogether moot the current debate.

Staff reviewed these options at an Interested Persons Meeting on April 7, 2003. Significantly, no additional approaches were identified or recommended.

1. Background

Buckley articulated the "express advocacy" standard not to define the outer bounds of permissible regulation of campaign speech, but as a narrowing construction of two provisions of the federal act which did not provide clear guidelines for identifying speech properly subject to regulation. As drafted, those provisions could have been applied to all speech relative to a "clearly identified candidate," or to all expenditures made "for the purpose of influencing" a federal election. Since the high court could not re-write these provisions, the court articulated a narrow construction of the statutes that would preserve their constitutionality – by limiting their application to speech expressly advocating the election or defeat of a clearly identified candidate.

Ethics Commission requested that the opinion be depublished.

[4] *Senator Mitch McConnell et al. v. Federal Election Commission, et al.* As of this writing, the case is pending decision before a special three judge panel, whose opinion will then be reviewed by the U.S. Supreme Court.

Beginning in 1996, federal candidates and committees began investing heavily in advertising campaigns touting the merits of a clearly identified candidate, or denouncing the vices of an opponent, without adding a clear call for the election or defeat of the subject candidate. This form of advertising soon became popular in state elections. Such advertisements could not be defined as express advocacy so long as they avoided an overt plea for voter action, and were called instead "issue ads," for want of a better term.[5]

Although developments over the last six years have given rise to an emerging legislative tendency to identify campaign communications by criteria that do *not* include express advocacy, the Act continues to base major disclosure requirements on the presence or absence of express advocacy in communications. The provisions discussed in this memorandum read as follows:

> " 'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." (Section 82031.)

> "A communication 'expressly advocates' the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as 'vote for,' 'elect,' 'support,' 'cast your ballot,' 'vote against,' 'defeat,' 'reject,' 'sign petitions for' or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election." (Regulation 18225(b)(2).)

The question for the Commission is, ultimately, whether regulation 18225(b)(2) should be updated in light of recent commentary by the courts.

2. The *Davis* Opinion

In its March memorandum, staff observed that in both *Schroeder* and *Davis*, a court encountered a plaintiff who read *Furgatch* expansively in support of an unsuccessful claim that a communication was express advocacy. The *Schroeder* court did not accept plaintiff's reading of *Furgatch* and, in effect, construed that decision narrowly to harmonize it with a federal majority rule.

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[5] As discussed below, Congress has recently defined a new term, "electioneering communication," to describe campaign advertisements which evade classification as express advocacy, while their intent and function is still to promote the election or defeat of a clearly identified candidate. California has recently defined "Communications Identifying State Candidates," in § 85310, along similar but more specialized lines.

The *Davis* Court, on the other hand, chose not to attempt a "narrowing construction" of *Furgatch*, but rejected the decision outright as the product of faulty analysis. Instead, *Davis* imposed a narrowing construction on those portions of § 82031 and regulation 18225(b)(2) that might be interpreted as supporting a "*Furgatch*-like" analysis, to harmonize the challenged provisions with the federal majority rule. Because of its extended discussion, it is the *Davis* decision that most sharply highlights the issues now before the Commission.

The lawsuit in *Davis* grew out of television advertisements run by defendant American Taxpayers Alliance in the summer of 2001, criticizing Governor Davis' handling of the state's energy crisis. Defendant had filed neither a Statement of Organization nor a semi-annual report in California, which plaintiff thought was required under §§ 84101 and 84200 because of the overtly political character of the advertisement. Defendant responded with a SLAPP suit motion under CCP § 425.16. The trial court agreed with plaintiff that the advertisement expressly advocated the defeat of Governor Davis in the upcoming statewide election, and granted plaintiff's request for a preliminary injunction against further violation of the Act's reporting requirements. At the same time, the trial court denied defendant's SLAPP suit motion.

This decision was reversed on appeal. The Court found that the Complaint alleged that protected speech gave rise to reporting obligations flatly ignored by plaintiff. (*Davis, supra,* 102 Cal.App. 4th at 459.) The issue, as framed by the Court, was defendant's right to run the ad without filing campaign statements or identifying donors to defendant's organization.

The second step of the analysis was an assessment of the merits of plaintiff's claim that defendant had no constitutional right to ignore California's reporting rules – specifically the requirement of § 84101 that defendant file a Statement of Organization, and that it file semi-annual statements (as a committee) under § 84200.[6]

Defendant had argued that only express advocacy may be subject to regulation, and plaintiff responded that the speech at issue *was* express advocacy. The Court took up this debate, noting that the "expenditure" which creates an obligation to comply with California law is defined to include communications "expressly advocating" the election or defeat of a clearly identified candidate. (*Id*. at 461-462; § 82031; Reg. 18225(b)(2).) Citing *Buckley* and *MCFL*,[7] the Court observed that disclosure of the kind at issue in this case could be compelled *only* in response to communications containing "express advocacy." (*Id*. at 465-466.)

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[6] A person receiving contributions of $1,000 or more in a calendar year qualifies as a recipient committee under the Act. (Section 82013(a).)

[7] *FEC v. Massachusetts Citizens For Life* (1986) 479 U.S. 238.

The Court found no express advocacy in the advertisement at issue. Plaintiff's citation of *Furgatch* to support the contrary argument caused the Court to dwell at length on the perceived deficiencies of that opinion. The Court first noted that it was not bound to accept *Furgatch* as controlling authority, that the authority of *Furgatch* in any event is entitled to no greater weight than that of the federal circuits in conflict with it, and that *Furgatch* is in fact "the sole departure from the bright line test of express advocacy articulated by the United States Supreme Court in *Buckley*." (*Id*. at 468.)

The Court observed that "[an FEC regulation], which was derived directly from the language of *Furgatch*, has also been repeatedly and uniformly found violative of the First Amendment by the federal courts." The Court said that, since *Buckley* and *MCFL* limited federal regulatory authority to communications expressly advocating the election or defeat of a clearly identified candidate, a regulation based on *Furgatch* cannot pass constitutional muster insofar as it shifts the focus from the words themselves to the overall impressions of a hypothetical, reasonable viewer. (*Id*. at 469). After noting that a similar Iowa regulation had also been struck down on these grounds, the Court applied its reasoning to California:

> "The definition of an "expenditure" in the Political Reform Act of 1974 must be limited in accordance with the First Amendment mandate "that a state may regulate a political advertisement only if the advertisement advocates *in express terms* the election or defeat of a candidate…. The *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amend-ment as interpreted in *Buckley* and *MCFL*. Instead, we iterate that the language of the communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate. Although application of this rule may require making straightforward connections between identified candidates and an express term advocating electoral action (as in *MCFL*), the focus must remain on the plain meaning of the words themselves. Under the bright-line test of *Buckley*, contextual factors are irrelevant to our determination whether the advertisements contain express advocacy. (*Id*. at 470, emphasis in the original, citations omitted.)

The Court had earlier said that, "[i]n our examination of the coverage and validity of the Political Reform Act we must also adhere to the fundamental rule that a statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality." (*Id*. at 464.) Seven pages later, the Court decided that it must impose a narrow "saving" construction on §§ 82031, 82025, and regulation 18225, applying these provisions "only to those communications that contain express language of advocacy with an exhortation to elect or defeat a candidate." (*Id*. at 471.)

The *Davis* court certainly supports a strict bright-line rule defining express advocacy as a communication which contains within itself both reference to a clearly identified candidate *and* a clear plea for action at the ballot box. *Davis* does not explore the topic of "context" with equal clarity, and left it unclear whether the timing of a communication is a "contextual factor" that cannot be considered in evaluating whether a message contains express advocacy.

3. "Context" in Context

The proximity of a communication to an upcoming election could be regarded as a "contextual factor" *vis-à-vis* a campaign advertisement, and yet the *Davis* court plainly found relevance in the "contextual fact" that the advertisement actually before the court was published eight months prior to the first election in which Governor Davis would appear.[8]

What the *Davis* court *said* can be reconciled with the analysis it *actually employed* if we understand that the *Davis* court did not regard the date of an upcoming election as the kind of "contextual factor" that was "irrelevant" to a proper analysis of language as express advocacy. This is a real possibility since awareness of a coming election may be crucial to understanding even the meaning of a word like "support," enshrined among the examples of "magic words" listed in *Buckley*.[9] Under the analysis used by the *Davis* court, an advertisement calling on viewers to "Support Councilmember X on Tuesday" could not be mistaken for express advocacy if Councilmember X had just been elected, and was trying to rally support for a new land use ordinance at the city council meeting the following Tuesday. But if that Tuesday were election day, the word "support" would have the meaning anticipated by *Buckley*, and the ad would expressly advocate the election of a clearly identified candidate.

The *Furgatch* court did not elaborate on the meaning of "limited reference to external events," and *Davis* did not explain what it meant by "context." We cannot be sure that *Furgatch* and *Davis* are debating the same concept. *Furgatch* has often been (mis)cited as authority for "shifting the focus of the Supreme Court's analysis from the *words* of a communication towards larger, less tangible *impressions* of the message," [10] and the *Davis* court may have been reacting to such interpretations of *Furgatch* when it prohibited the importation of "contextual factors" into the analysis of express advocacy. But this would be an objection to overly subjective analysis, rather than a wholesale indictment of external information used, for example, to establish the meaning of words like "Support

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[8] In reviewing the language of the advertisement at bar, the Davis court observed: "Although the parties agree that Governor Davis was a clearly identified candidate, no election was imminent when the advertisement was presented in June of 2001, as in *MCFL* and *Furgatch*." (*Davis, supra*, 102 Cal.App. 4th at 471.)

[9] At footnote 52.

[10] As described in staff's March memorandum at page 3.

Councilmember X" in the example given above. *Buckley* does not rule out reference to objectively determinable external facts such as the proximity of an election.

As noted earlier, since campaigns generally respected the spirit of the "express advocacy" standard for twenty years following *Buckley*, Congress saw little need to return to the drawing board – until recently.[11] Since *Buckley* indicated that Congress could constitutionally require disclosure of expenditures on communications that were "unambiguously campaign related" (*Id*. at p. 81), Congress was not limited to seeking disclosure relating to communications containing express advocacy. But federal candidates and committees now invest heavily in advertising campaigns touting the merits of a clearly identified candidate, or denouncing claimed vices of the opponent, without adding a clear call for the election or defeat of the subject candidate. Advertisements of this sort cannot be defined as express advocacy. BCRA therefore has introduced a requirement for disclosure of expenditures on "electioneering communications," defined (in simple terms) as broadcast communications referring to a clearly identified federal candidate, publicly distributed within a certain time period prior to an election, to the candidate's electorate. (*See* 2 U.S.C. 434(f)(3); 11 CFR 100.29).

"Electioneering communications" are not defined by details of language, but by factors which (apart from the required reference to a clearly identified candidate) are plainly external to the message. Importantly, the defining criteria designed by Congress have eliminated any uncertainty in determining which advertisements are "electioneering communications." The California Legislature has written a very similar provision in § 85310, requiring disclosure of expenditures beyond a threshold amount for "Communications Identifying State Candidates." Like its federal cousin, § 85310 defines communications subject to its provisions by details of how and when the communication is published, rather than relying on details of the language employed in the advertisement.[12]

The electioneering communication provisions of BCRA have, of course, been challenged by opponents of BCRA, and its constitutionality will be decided by the Supreme Court in its next term. Section 85310 has not been challenged, but the significant point here is that both Congress and the

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[11] The following outline is drawn from the opening brief of the Congressional Sponsors of BCRA, which may be downloaded from, or viewed at: http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{735c3361-9c93-446b-82ec-775f72c4baf8}.pdf (see especially at pages 66-70), and from the amicus brief filed by Former Leadership of the American Civil Liberties Union, (pages 8-11) which may be downloaded from, or viewed at: http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{59d329c0-a4c3-4df9-adad-7d392dbb2fd9}.pdf (see especially pages 8-11). Both of these briefs have been redacted prior to public distribution to preserve the confidentiality of certain evidence submitted to the court. These redactions have no effect on the narrative given in the text above.

[12] Thus § 85310(a) provides: "Any person who makes a payment or a promise of payment totaling fifty thousand dollars ($50,000) or more for a communication that clearly identifies a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election, shall file online or electronically with the Secretary of State a report disclosing the name of the person, address, occupation, and employer, and amount of the payment. The report shall be filed within 48 hours of making the payment or the promise to make the payment."

California Legislature have read *Buckley* to permit regulation of communications "unambiguously campaign related," defined by criteria external to the communication itself. These legislative bodies believe that there is nothing inherently unconstitutional in considering the external context of an ad, so long as the deciding factors are not impermissibly vague.

Furgatch may be subject to criticism for allowing "limited reference to external events" without specifying how and when such reference might be made. But *that* failing in *that* opinion does not establish that contextual factors are always inherently vague or unconstitutional. There do not seem to be any such ambiguities in 2 U.S.C. 434(f)(3), or in § 85310. The *Davis* court itself indicates that the date of an election relative to a political advertisement is relevant to its classification as express advocacy, and the simple example of Councilmember X explains further how the meaning of a word like "support" can at times be settled only with knowledge of when an election will be held. In summary, the Constitution does not rule out any and all reference to "context" in the identification of express advocacy.

4. Decisions for the Commission

In its March memorandum on this subject, staff had already identified the problem of context as a likely subject for any amendment to regulation 18225(b)(2). The Interested Persons Meeting in April gave staff an opportunity to discuss its preliminary conclusions and, especially, to learn whether the regulated community had identified any additional areas that might merit attention.[13] No other potential amendments were suggested, and staff therefore believes that the Commission has three options regarding amendment of regulation 18225(b)(2). *First*, insert a reference to "context" in the regulation to reflect the presence of that term in § 82031, and define "context" as limited to the *internal* context of the communication itself. *Second*, insert the same reference to context, for the same reason, but define "context" as limited to internal context read with knowledge of an upcoming election. *Third*, defer amending the regulation because no amendment is required by *Schroeder* or *Davis*, and is unnecessary so long as staff continues to read the existing regulation within the guidelines provided by developing case law.[14]

A. The Argument for a Strict "Magic Words" Test

"Option A" in the attached regulation illustrates an amendment that would implement a strict "magic words" test for express advocacy. The language of the *Davis* decision supports a simple "magic words" test, finding express advocacy only in communications which employ words that include a clear plea for voter action for or against a clearly identified candidate or ballot measure, without

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[13] The regulated community and other members of the public were given opportunity to participate at the Interested Persons Meeting either in person or by telephone.

[14] Both Option A and B refer to "symbols" along with words. Existing case law supports an interpretation of symbols like "stop signs" for clearly equivalent word in the analysis of express advocacy. Mention of such symbols in the regulation is a refinement, but not a necessary one.

reference to any external context. Such a rule would have the advantage of simplicity, and explains the meaning of "context" as limited to the words and symbols con-tained in the communication. Since the Enforcement Division currently includes proximity to an election in its evaluation of communications said to contain express advocacy, this approach would require a major policy change, and might be inconsistent with a fundamental purpose of the Act – fostering disclosure of campaign expenditures – if there is a less restrictive alternative.

B. The Argument for a "Modified Magic Words" Test

"Option B" in the attached regulation illustrates amendments that would implement a "modified magic words" standard. The analysis actually used in the *Davis* decision supports a modified "magic words" test, which would find express advocacy only in communications using words that include a clear plea for voter action for or against a clearly identified candidate or ballot measure. However, under this option the words within a communication are not evaluated in strict isolation, but in light of the communication's proximity to a coming election. Such a rule would add some complexity to a "strict" magic words standard, and would be more likely to attract constitutional challenges, yet a "modified magic words" test comports with the approach employed by *Davis,* and by this agency. Because permissible "external" context is limited to proximity of a communication to an election, it is possible that there would be some reduction of enforcement activity under Option B.

Bracketed language within Option B marks off an ancillary decision point, whether the Commisison would prefer to cut off consideration of timing at a specific date, such as 45 or 90 days before an election – or leave the relevance of timing to be decided under the facts peculiar to the circumstances of each communication.

C. The Argument for Deferring Amendment Pending Further Changes in the Law

When a court imposes a narrowing construction on a statute or regulation, it is ordinarily not necessary to amend the rule in question – an administrative agency charged with applying a rule simply adopts and applies the court's construction of it. If the Commission decides to employ the analysis used by the *Davis* court, there should be no need to amend the regulation. Moreover, recent history makes it clear that campaign practices and case law evolve, and the Commission should recognize that its staff will face challenging questions of interpretation, no matter what rule the Commission adopts.[15] The most prudent course may be to wait until an actual communication demonstrates an actual need for a particular amendment to regulation 18225(b)(2).

[15] As shown in the case of Councilmember X, even a "pure magic words test" requires interpretation; the very words listed as exemplars by *Buckley* have meanings other than those anticipated by the court, determinable only by reference to context.

5. Staff Recommendations

Staff recommends that the Commission not amend regulation 18225(b)(2) at present. The law on express advocacy has been in flux for some time, but has been converging on the approach employed by the *Davis* court. *Furgatch* has been under attack for years, and staff has been updating its construction of the regulation in response to emerging case law. The last advice letter containing a lengthy explanation of express advocacy was the *Hoffman* Advice Letter, No. A-00-074, which (but for deferential references to *Furgatch*) is consistent with the *Davis* court's analysis. Apart from abiding uncertainties regarding "context," *Davis* does not represent a surprising development.

Because the law in this area is likely to be fully reviewed when the Supreme Court decides the BCRA litigation next year, staff believes that the Commission should defer until then any amendment to regulation 18225(b)(2). In the interim, with guidance from the Commission on whether *Davis* should be interpreted as imposing a "pure magic words test," or admits some consideration of context, staff can continue to evaluate communications for express advocacy by reading the regulation in light of evolving case law.

If the Commission believes that an amendment should be adopted in the aftermath of *Davis*, staff supports Option B, the "modified magic words" standard which would authorize staff to employ the same analytical approach used by the *Davis* court.